1995

Accounting v. Murdock : Brief of Appellant

Utah Court of Appeals

Joh G. Mulliner; attorney for appellee.
Daniel A. Stanton, Aron Stanton, P.C.; attorney for appellant.

AUDIT & ACCOUNTING AUTHORITY, LTD.
PLAINTIFF / APPELLEE / COUNTERCLAIM DEFENDANT
v.
BILLIE MURDOCK
DEFENDANT / APPELLANT / COUNTERCLAIM PLAINTIFF

In The Utah Court of Appeals

DOCKET NO. 950409-CA

BRIEF OF THE APPELLANT

ON APPEAL FROM A FINAL JUDGMENT
BEFORE THE THIRD CIRCUIT COURT FOR UTAH
SALT LAKE COUNTY, SANDY DEPARTMENT
JUDGE: HON. ROGER A. LIVINGSTON

JOHN G. MULLINER
ATTORNEY FOR APPELLEE
363 N. UNIV. AVE., SUITE #103
P. O. BOX 1045
PROVO, UTAH 84606

DANIEL A. STANTON,
ARON STANTON, P. C.
ATTORNEY FOR APPELLANT
1008 WELLSPRING ROAD, #20-F
MIDVALE, UTAH 84047

ARGUMENT PRIORITY CLASSIFICATION: 15

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STATEMENT OF JURISDICTION

The jurisdiction of the circuit court was established pursuant to § 78-4-7 Utah Code Ann., and 15 U.S.C. § 1692k(d). The jurisdiction of this Court is established pursuant to § 78-2a-3(2)(d) and 15 U.S.C. § 1692k(d).

STATEMENT OF THE ISSUES

(Respecting Both Parts of This Two-Part Appeal - (Part A and Part B))

ISSUE NO. 1: Did the circuit court err by restricting the time for trial and thereby deprive Defendant of fundamental due process under section one of the fourteenth amendment to the U. S. Constitution, and Article I, section 7, of the Constitution of the State of Utah?

(Respecting Part A)

ISSUE NO. 2: Did the circuit court err in granting judgment to Plaintiff where Defendant had previously raised, in her amended Answer pleadings pursuant to Rule 8(c), U.R.C.P., the affirmative defense that Plaintiff's claims were stale and thus barred by the doctrine of waiver, laches, and estoppel?

ISSUE NO. 3: Did the circuit court err by denying Defendant equal protection under the law where it awarded assignee Plaintiff the benefit of interest pursuant to Assignor's contract while precluding Defendant from calculating like interest amounts pursuant to her unambiguous contract upon which Assignor had previously defaulted, in order to obtain an equal, or greater, offset against assignee Plaintiff's claims as provided pursuant to Rule 13(c), U.R.C.P.?

ISSUE NO. 4: Did the circuit court err in granting judgment to Plaintiff where it calculated Plaintiff's claims by relying on defense exhibit incorporating Assignor's unproven amounts in light of finding that Plaintiff's case suffered from lack of adequate evidence in the record?

(Respecting Part B)

ISSUE NO. 5: Did the circuit court err by finding that Defendant had failed to prove, "by a preponderance of the evidence," that she had a cause of action pursuant to the FDCPA and the UCSPA where she was precluded from prosecuting her claims thereunder as the proximate result of the time restraints imposed for trial?

STATEMENT OF THE CASE

This case arises from events commencing in early 1982 when Plaintiff's Assignor ("Assignor" or "Creditor") defaulted on an equipment purchase contract with Defendant ("Defendant's Contract"). Thereafter, Defendant offered to trade amounts in default for dental services in lieu of payment by Assignor and a verbal agreement was struck. During Defendant's treatment more extensive procedures were required which necessitated direct negotiations between Assignor and Defendant's insurance carrier. These entities, upon completion of negotiations, represented to Defendant that they "had agreed" as to the estimated costs of treatment but neither entity disclosed the substance of these negotiations to Defendant then or thereafter. Defendant's dental treatment was completed in 1984 and Assignor submitted a statement for the purported balance due. Assignor's statement failed to reflect credit for the prior default amounts and numerous insurance benefit payments. Thereupon a dispute arose between the Parties. In 1991, Assignor assigned the purported balance due to Plaintiff, a third-party collection agency, to effect collection thereof. During the course of collection attempts, Plaintiff committed various acts which Defendant asserts to be in violation of both the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and the Utah Consumer Sales Practices Act § 13-11-1 *et seq.*, Utah Code Ann. Plaintiff instituted this action in 1992. Defendant originally answered *pro per* and denied Plaintiff's allegations. Thereafter, Defendant retained counsel and obtained leave to file an amended answer and add a counterclaim. After various motions and two pretrial conferences, trial

was held in December 1994 and judgment was rendered for Plaintiff. Defendant objected to Plaintiff's post-trial submission of findings of fact and conclusions of law and judgment on the grounds of manifest error.

On 5 May 1995, another hearing was held in an attempt to resolve this post-trial dispute, whereupon a final Order was entered reflecting the provisions of revised findings and conclusions. From that Judgment this two-part appeal is now taken.

STATEMENT OF THE FACTS

The facts set forth in Part A of this appeal deal solely with matters regarding the claims in Plaintiff's complaint and Defendant's defenses and counterclaims thereto. Part B hereof deals with the subject matter of Defendant's counterclaim which seeks relief for Plaintiff's alleged violations of the FDCPA which, in turn, give rise to additional pendent claims under the UCSPA. Although the claims under both Part A and Part B necessarily arise from the same disputed transactions, the two Parts bear no logical relationship to each other.[1] With respect to Part A, the facts date from Assignor's default on Defendant's Contract for postage and mailing equipment, executed 31 March 1982, and subsequent events related thereto. These events eventually culminated in Assignor's assigning to Plaintiff the alleged debt purported to be owed by Defendant and ultimately resulted in the instant litigation now on appeal here. With respect to Part B, the facts stem from Plaintiff's initial communication to Defendant, dated 8 May 1991, as a third-party debt collector, and events transpiring thereafter, all of which Defendant alleges violated the

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[1] See *Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1137 (8th Cir., 1981) (While the debt claim and the FDCPA counterclaim raised here may, in a technical sense, arise from the same...transaction, the two claims bear no logical relation to one another. Although there is some overlap of issues raised in both cases as a result of the defenses raised in the state action, the suit on the debt brought in state court is not logically related to the federal action initiated to enforce federal policy regulating the practices for the collection of such debts).

FDCPA and give rise to the additional protections afforded pursuant to the UCSPA. This two-part appeal raises five (5) principal issues for review by this Court. The first issue relates to both Part A and Part B. Issues #2 through #4, inclusive, relate to Part A only, while Issue #5 relates solely to Part B.

STANDARD OF REVIEW

ISSUE NO. 1: Did the circuit court err by restricting the time for trial and thereby deprive Defendant of fundamental due process under section one of the fourteenth amendment to the U. S. Constitution, and Article I, section 7, of the Constitution of the State of Utah? This question presents a conclusion of law which the Court of Appeals reviews for correctness. *United Park City Mines* v. *Greater Park City Co.*, 870 P.2d 880, 885 (Utah, 1993); *Society of Separationists, Inc.* v. *Taggart*, 862 P.2d 1339, 1341 (Utah, 1993); *McMahan* v. *Dees*, 873 P.2d 1172, 1175 (Ut.Ct.App., 1994); *Wade* v. *Stangl*, 869 P.2d 9, 12 (Ut.Ct.App., 1994). Appellate courts have the ultimate power to conduct an independent review of federal constitutional claims. *City of St. George* v. *Turner*, 860 P.2d 929, 932 (Utah, 1993) (citing *Miller* v. *California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 [1973]).

RESPECTING PART A

ISSUE NO. 2: Did the circuit court err in granting judgment to Plaintiff where Defendant had previously raised, in her amended Answer pleadings pursuant to Rule 8(c) U.R.C.P., the affirmative defense that Plaintiff's claims were stale and thus barred by the doctrine of waiver, laches, and estoppel? This issue, likewise, presents a conclusion of law which the Court of Appeals reviews for correctness. *State* v. *Pena*, 869 P.2d 932, 936 (Utah 1994); *Provo River Water Users' Ass'n.* v. *Morgan*, 857 P.2d 927, 931 (Utah 1993); *Higgins* v. *Salt Lake County*, 855 P.2d 231, 235 (Utah 1993); *Klinger* v. *Kightly*, 791 P.2d 868, 870 (Utah 1990); *Scharf* v. *BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985); *Sevy* v. *Security Title*

Co., 857 P.2d 958, 961 (Ut.Ct.App., 1993), *cert. granted*, 870 P.2d 957 (Utah 1994). This standard has also been referred to as a "correction of error standard." *Jacobsen Inv. Co. v. State Tax Comm'n.*, 839 P.2d 789, 790 (Utah 1992); *Sanders v. Ovard*, 838 P.2d 1134, 1135 (Utah 1992); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 (Ut.Ct.App., 1993). With regard to the issue of laches, see *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256, 1260 (Utah 1975). *Cited in Leaver v. Grose*, 610 P.2d 1262, 1264, n. 2 (Utah 1980); *Plateau Mining Company v. Utah Division of State Lands and Forestry, et al.*, 802 P.2d 720, 731 (Utah 1990); *Sandy City v. Salt Lake County*, 827 P.2d 227, 230, n. 5 (Utah 1992).

ISSUE NO. 3: Did the circuit court err by denying Defendant equal protection under the law where it awarded assignee Plaintiff the benefit of interest pursuant to Assignor's contract while precluding Defendant from calculating like interest amounts pursuant to her unambiguous contract upon which Assignor had previously defaulted, in order to obtain an equal, or greater, offset against assignee Plaintiff's claims as provided pursuant to Rule 13(c), U.R.C.P.? This issue presents a conclusion of law and is reviewable by the Court of Appeals for correctness as cited in the authorities in Issues No. 1 and 3, above. For authorities deciding whether the court properly interpreted an unambiguous contact, see: *Saunders v. Sharp*, 806 P.2d 198, 199-200 (Utah 1991); *Allstate Ins. Co. v. Liberty Mut. Ins. Group*, 868 P.2d 110, 112 (Ut.Ct.App., 1994); *Edwards & Daniels Architects, Inc. v. Farmers' Properties, Inc.*, 865 P.2d 1382, 1385 (Ut.Ct.App., 1993); *LMV Leasing, Inc. v. Conlin*, 805 P.2d 189, 192 (Ut.Ct.App., 1991).

ISSUE NO. 4: Did the circuit court err in granting judgment to Plaintiff where it calculated Plaintiff's claims by relying on defense exhibit incorporating Assignor's unproven amounts in light of finding that Plaintiff's case suffered from lack of adequate evidence in the record? This issue presents a conclusion of law and is reviewable by the Court of

Appeals for correction of the court's calculations as cited in the authorities set forth in Issues No. 1 and 3, above.

RESPECTING PART B

ISSUE NO. 5: Did the circuit court err by finding that Defendant had failed to prove, "by a preponderance of the evidence," that she had a cause of action pursuant to the FDCPA and the UCSPA where she was precluded from prosecuting her claims thereunder as the proximate result of the time restraints imposed for trial? This issue presents a question of fact which is reviewable under the clearly erroneous standard. See ***Western Capital & Secs., Inc. v. Knudsvig***, 768 P.2d 989 (Ut.Ct.App.), *cert. denied*, 779 P.2d 688 (Utah 1989) (Findings of fact are clearly erroneous if the appellant can show that they are without adequate evidentiary foundation or if they are induced by an erroneous view of the law); ***Maughn v. Maughn***, 770 P.2d 156 (Ut.Ct.App., 1989); ***Monroc, Inc. v. Sidwell***, 770 P.2d 1022 (Ut.Ct.App., 1989); ***Weston v. Weston***, 773 P.2d 408 (Ut.Ct.App., 1989); ***Butler v. Lee***, 774 P.2d 1150 (Ut.Ct.App., 1989) (Findings of fact are clearly erroneous if it can be shown that they are against the clear weight of evidence or that they induce a definite and firm conviction that a mistake has been made). Whether a statute applies to a particular set of facts is a question of law which is reviewed for correctness. ***State v. Waite***, 803 P.2d 1279, 1282 (Ut.Ct.App., 1993).

SUMMARY OF ARGUMENT

The *First Issue* presented herein relates to the entirety of both Part A and Part B of this two-part appeal. It presents a substantive due process question which arises from the circuit court's untimely restriction placed upon the time for trial, which restriction Defendant argues precluded her from her rightful day in court, thus operating to prohibit her from fully prosecuting her defenses and counterclaims. Issues two through four, inclusive, deal solely with questions arising under Part A regarding the subject matter of

Plaintiff's complaint, while under Part B the fifth issue deals with Defendant's counterclaims under the FDCPA and UCSPA. The *Second Issue* in this appeal presents the question of whether Plaintiff's claims were barred by laches owing to Assignor's lack of diligence in prosecuting its alleged claims and the subsequent loss of relevant evidence resulting from the inordinate lapse of time and inadequate record-keeping, rendering such evidence unavailable, together with unavailability of a material witness having first-hand knowledge of the facts from the outset, and argues that this affirmative defense is preserved on appeal where it is contained in Defendants's amended answer and counterclaim pleadings. The *Third Issue* presents the question of whether the circuit court erred in granting judgment in favor of Plaintiff where it relied upon clearly erroneous amounts contained in billing statements previously mailed to Defendant by Assignor, thereby determining, as the basis for its calculations, an amount exceeding the relief sought in Plaintiff's complaint by more than $1,350.00. The *Fourth Issue* presents the question of whether the circuit court erred by denying Defendant equal protection pursuant to the express terms of her contract upon which Assignor had previously defaulted, and argues on appeal that the court erred by excluding Defendant's contract from being published and that Defendant was thereby precluded from the benefit of interest due thereunder in calculating her offset against Plaintiff's claims while Plaintiff was awarded interest pursuant to its contract with Defendant -- both contracts providing for equal rates of interest. Lastly, the *Fifth Issue*, pursuant to Part B, presents the question of whether the circuit court erred by summarily concluding, as a matter of law, that Defendant had failed to meet her burden of proof "by a preponderance of the evidence" establishing that she had a cause of action pursuant to the FDCPA and the UCSPA in light of the fact that the untimely restriction of time for trial effectively precluded her from fully prosecuting her claims through direct examination of witnesses on such issues, and argues that the court's

request for Counsel to simply provide it with a cursory "Reader's Digest" version of the substantive matter thereof manifestly violated the letter and spirit of clear congressional and state legislative intent under both Acts as established by well settled decisional law.

ARGUMENT

(Respecting Both Part A and Part B)

ISSUE #1: Did the circuit court err by restricting the time for trial and thereby deprive Defendant of fundamental due process under section one of the fourteenth amendment to the U. S. Constitution, and Article I, section 7, of the Constitution of the State of Utah?

At two (2) pretrial conferences held during the protracted litigation of this case,[2] and on no less than six (6) separate instances thereat, the court below plainly stated that the Parties would be allowed a half-day for trial, or reasonably thereabout, to try the issues in controversy. Addressing Defendant's counsel in this regard, the court first stated as follows:

> "I'm going to indicate to you that I'm going to give your client absolutely the day in court to which any litigant is entitled." (P.T., 10 Dec. 1993, page 5, lines 10-12.)[3]

Later in this pretrial conference the court again stated:

> "This is the kind of case that really should take no longer than a half a day." (P.T., at p. 13, lines 12-13. *Ibid.*)

And finally, the court concluded by expressing its willingness to accommodate the Parties' respective schedules and, inquiring as to the fairness of its determination in this regard, stated as follows:

> "Now please understand when I said I'll accommodate your schedule, I go to Summit County and handle two courts up there. I am also locked into circuit prelim dates and generally I have to get filed -- generally a Friday,

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[2] Respectively, on 10 December 1993, and 28 October 1994.

[3] Pretrial Conference Transcript. Herein, citations to Pretrial Conference Transcripts are denoted as "P.T.," followed by the hearing date with appropriate citation to the page and line numbers. Similarly, citations to Reporter's Trial Transcript are denoted as "R.T."

maybe a Tuesday, I could get in but we are very current in this court and I'm not going to delay the resolution of this case. As soon as you tell me it's ready, within a matter of weeks you can have a half-day trial setting. Does that sound fair?" (P.T., at p. 15, lines 13-20. *Id.*)

At the second pretrial conference held more than ten (10) months later, the court continued this line of reasoning wherein it gave cognizance to the efforts thus far expended in the matter and again stated as follows:

"I wonder -- you obviously have both put in an extended amount of work in trying to get this case either brought to trial or not. And I certainly want to give you what time you want to present those arguments. I wonder if it might be more fair to both of you to just allow me to call the rest of the calender (sic) and see what we can get resolved and I would not have to rush it through." (P.T., 28 October 1994, p. 3, lines 14-20. *Ibid.*)

Upon setting the trial date, the court then stated:

"Let's set this [for] 1:30 on December 16th. I'm going to allow that afternoon a half day trial setting. I'll not set other matters, let you start right at 1:30 on Friday, December 16th." (P.T., at p. 5, lines 13-16. *Id.*)

And concluding, stated again:

"...- - [t]hat will give us a realistic chance to get this done in a half day. ... If you were to exchange that [list] by December 1st, and you have a first place trial setting for Friday, December 16th at 1:30." (P.T., at p. 6, lines 19-20, and p. 7, lines 2-4, respectively. *Id.*)

Thus, for more than a year in accordance with the aforesaid pronouncements notwithstanding the longevity of the facts in this case extending back more than a dozen years -- Defendant justifiably and reasonably relied upon the expectation that she was going to be afforded a half-day for trial, or reasonably thereabout, to fully argue her defenses to Plaintiff's claims and to prosecute her counterclaim allegations. Indeed, the right to resort to the courts in order to obtain both procedural and substantive due process is a fundamental right that has been guaranteed by the Constitution of the State of Utah since its adoption and ratification in 1896. Art. I, § 11, thereof provides as follows:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law,

> which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

Citing this constitutional provision, the Utah Supreme Court has stated:

> "The right to resort to the courts for the adjudication of grievances and the settlement of disputes is a fundamental and important one." ***LeGrand Johnson v. Peterson***, 420 P.2d 615, 616 (Utah, 1966). See also, ***Barnhart v. Civil Service Employees Insurance Co.***, 398 P.2d 873, 875 (Utah, 1965). *Ibid.*

Notwithstanding the long-anticipated time for trial however, on the very day of trial, within mere hours of the scheduled time, Defendant was notified by the court that a one (1) hour time restriction had been imposed in which to try the case. Defendant, in reasonable reliance upon the trial court's prior statements in this regard, had allocated roughly 1-1/2 hours each, more or less, in which to (i) argue and defend against Plaintiff's claims, as set forth in Part A of her pleadings, and (ii) to prosecute her counterclaim allegations under the Fair Debt Collection Practices Act ("FDCPA") and the Utah Consumer Sales Practices Act ("UCSPA"), as set forth in Part B thereof. Having thus been untimely restricted as aforesaid, Defendant was deprived of the essential elements of substantive and procedural due process and, as the proximate result thereof, suffered undue harm and prejudice.

It is axiomatic that "due process" literally means "the process that is due," or, as legally defined: "Law in its regular course of administration through courts of justice."[4] It is equally well-settled that an essential element of that process is the right to be heard, or, one's right to his or her day in court. See, for example, ***State v. Sykes***, 840 P.2d 825, 830 (Ut.Ct.App., 1992) (Jackson, J., concurring) ("Each person is entitled to his or her day in court"). Indeed, due process is a fundamental guarantee under the fifth and fourteenth amendments to the U. S. Constitution as well as Article I, section 7, of the Constitution of

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[4] *Blacks*, Second (1891); Sixth (abridged) (1991). Also, *Bouvier's* (1914).

the State of Utah. Section one of the fourteenth amendment provides, in pertinent part, as follows:

> "...[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Const. Amend., art. XIV.

Article I, section 7, of the Utah Constitution accordingly provides:

> "No person shall be deprived of life, liberty or property, without due process of law."

Perhaps the rationale of the foregoing is nowhere better expressed than by the words of former United States Supreme Court Justice, George Sutherland, who, in a 1921 address before the New York Bar when he was president of the American Bar Association, stated thusly:

> "Property, per se, has no rights; but the individual -- the man -- has three great rights, equally sacred from arbitrary interference; the right to his life, the right to his liberty, and the right to his property. The three rights are so bound together as to be essentially one right. To give a man his life, but deny him his liberty, is to take from him all that makes life worth living. To give him his liberty but take from him the property which is the fruit and badge of his liberty, is to still leave him a slave."

That the court below clearly recognized these fundamental tenets are inextricably intertwined with due process cannot be doubted in view of its cited statements. Equally doubtless is the fact that these tenets have application to matters both criminal and civil as well as at law or in equity. The issues on appeal in this case raise valid due process questions involving equity and equal protection, which issues could have been fully argued at trial but for the court's demonstrated, untimely pretrial restriction. However true it may be that "by not arguing an issue or presenting pertinent evidence before the trial court, an appellant denies the trial court the opportunity to make findings of fact and conclusion of law relevant to the issues raised or objections to evidence," ***LeBaron & Assocs., Inc. v. Rebel Enters., Inc.***, 823 P.2d 479, 483 n. 6 (Ut.Ct.App., 1991); *accord* ***State v. Rangel***, 866 P.2d 607,

611 (Ut.Ct.App., 1993) (trial court should be allowed first opportunity to address claim that it has erred), this rationale seemingly has no application where, as here, the court itself was the principal actor in substantially precluding Defendant from such opportunity, even prior to the event of trial. Owing principally to this restriction on time for trial, numerous issues of fact in this case remain yet unadjudicated, some in their entirety, and particularly with respect to the issues set forth in Defendant's counterclaim pursuant to Part B thereof, although not strictly limited thereto. As the absence of substantive findings of fact upon numerous unadjudicated material issues renders it virtually impossible to "marshal the evidence" necessary to mount a successful challenge thereto, it becomes equally impossible to comply with this Court's holding expressed in ***Robb v. Anderton***, 863 P.2d 1322, 1328 (Ut.Ct.App., 1993) ("Appellate courts will not address the challenge unless the appellant has properly marshaled the evidence"). Moreover, Rule 52(a), U.R.C.P., provides, in pertinent part, that "...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Ibid.* Given the totality of the circumstances in this case and the unadjudicated documentary evidence necessarily published in the record as the proximate result of the abbreviated proceedings, it is not difficult to see that the court, by its own discretionary acts, effectively precluded itself of the opportunity to find upon material facts and to judge witness credibility upon direct examination thereof; all of which effectively operated to deprive Defendant of both substantive and procedural due process. Where, as here, the court below failed to adequately find upon relevant and highly material facts and issues,[5] the same are rendered non-existent and therefore incapable of either being upheld or adjudged to be clearly

[5] These issues comprise the balance of the questions in this appeal.

erroneous, as contemplated by Rule 52. To the extent such failure constitutes error, the judgment rendered on that basis is due to be reversed. *Anderson* **v.** *Utah County Bd. of County Comm'rs.*, 589 P.2d 1214, 1216 (Utah, 1979) (failure to find upon all material issues raised by the pleadings is reversible error); *LeGrand Johnson Corp.* **v.** *Peterson*, 18 Utah 2d 260, 262, 420 P.2d 615, 616 (1966) (It is the duty of the trial court to find upon all material issues raised by the pleadings, and the failure to do so is reversible error), *citing* *Baker* **v.** *Hatch*, 70 Utah 1, 9, 257 P.2d 673, 676; *see also*, *Gaddis Investment Co.* **v.** *Morrison*, 3 Utah 2d 43, 278 P.2d 284 and cases cited therein. Defendant's counterclaim pleadings raised such material issues, as set forth more fully hereinafter. It is equally settled that it is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived. *Boyer Co.* **v.** *Lignell*, 567 P.2d 1112, 1114 (Utah, 1977). By untimely precluding Defendant from arguing at trial various issues previously determined by the court as "discoverable" and "legitimate,"[6] the court, by its own discretionary action, created the very circumstance whereby it failed to enter adequate findings, and on that basis alone the judgment requires vacating. In this case, such findings were not only inadequate, but to the extent they remain unadjudicated at trial they are clearly non-existent. Accordingly, Defendant argues that the absence of adequate findings duly framed by the court renders the same legally insufficient. *Woodward* **v.** *Fazzio*, 823 P.2d 474, 477 (Ut.Ct.App., 1991) (Appellants need not marshal evidence when findings are so inadequate that they cannot be meaningfully challenged as factual determinations; rather, appellant can simply argue legal insufficiency of court's findings as framed). *See also*, **Utah Standards of Appellate Review**, *Utah Bar Journal*, Vol.

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[6] See, for example, P.T., 10 December 1993, p. 16, lines 5-8:
"The Court: ...[T]o tell you the truth, there's a number of items here that certainly there is legitimate discovery and that they ought to be able to have information."

7 No. 8, October 1994, p.25. *Ibid.*

Of equal relevance in this case is the fact that neither is due process dependent, in any respect, upon a specified dollar amount. Nevertheless, the record clearly shows that the court below obviously considered "certain" amounts, even those in excess of Plaintiff's claim,[7] to be of questionable merit where, during the course of trial, the court impliedly stated:

> "Let me ask you (inaudible) a whole trial over payment on a $5,000 claim?" (R.T., p. 23, lines 23-24.)

Yet, at the first pretrial conference held 10 December 1993, the court had sent mixed signals in this regard where it had previously said:

> "... - - [a]nd this is after all a relatively modest case. The amount sued upon, well, it's $4,000. It's an amount to which there's - - this is obviously not an insubstantial amount of money and certainly attorneys ought to be able to be well prepared before they go to trial for that - - for that kind of case. On the other hand it's not a 40,000 - - or a $400,000 case." P.T., 10 December 1993, pp. 11-12; lines 25, 1-6, respectively.

While the court's comments in this regard were at best inappropriate in view of its known jurisdictional limitation precluding it from even deciding matters in excess of $20,000.00,[8] nevertheless, the plain inference conveyed by the court's comments was that due process is seemingly functionally-dependent upon the amount at issue, *viz.*, the greater the amount in controversy, the more process that is due, and vice-versa. This is particularly repugnant when considered in light of the fact that the U. S. Constitution itself, for example, requires only that "...[w]here the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ...". U. S. Const. Amend. VII.

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[7] The amount originally sought in Plaintiff's complaint was $3,976.64.

[8] § 78-4-7, Utah Code Ann., provides: "The circuit court has civil jurisdiction, both law and equity, in all matters if the sum claimed is less than $20,000, exclusive of court costs, ..."

Moreover, neither does decisional law, federal or state, reflect any such monetary-amount bias, and particularly with respect to actions claiming under the FDCPA, as may be seen in the following federal appellate cases and the amounts in controversy therein decided: *Clomon* **v.** *Jackson*, 988 F.2d 1314, 1316 (2nd Cir., 1993): $9.42; *Crossley* **v.** *Lieberman*, 868 F.2d 566, 567 (3rd Cir., 1989): $297.79; *Swanson* **v.** *Southern Oregon Credit Service, Inc.*, 869 F.2d 1222, 1224 (9th Cir., 1989): $262.20; and *Pressley* **v.** *Capital Credit & Collection Service, Inc.*, 760 F.2d 922, 923 (9th Cir., 1985): $126.07. Numerous federal district cases also demonstrate a similar lack of bias with respect to the monetary amounts in controversy: *Seabrook* **v.** *Onandaga Bureau of Medical Economics, Inc.*, 705 F.Supp. 81, 82 (N.D.N.Y., 1989): $198.00; *Riveria* **v.** *MAB Collections, Inc.*, 682 F.Supp. 174, 175 (W.D.N.Y., 1988): $80.20, $31.96; *Kimber* **v.** *Federal Financial Corporation*, 668 F.Supp. 1480, 1482 (M.D.Ala., 1987): $150.70; *Bingham* **v.** *Collection Bureau, Inc.*, 505 F.Supp. 864, 867 (D.N.D., 1981): $958.65; *Rutyna* **v.** *Collection Accounts Terminal, Inc.*, 478 F.Supp. 980, 981 (N.D.Ill., 1979): $56.00; *Kizer* **v.** *Finance America Credit Corporation*, 454 F.Supp. 937, 938 (N.D.Miss., 1978) ([F]DCPA provides an independent jurisdictional grant without regard to jurisdictional amount). See also *In Re Scrimpsher*, Bkrtcy., 17 B.R. 999, 1007 (N.D.N.Y., 1982): $245.93, *citing* *Carrigan* **v.** *Central Adjustment Bureau, Inc.*, 494 F.Supp. 824, 826 (N.D.Ga., 1980) (federal student loan for tuition qualified as a 'debt' under FDCPA). State precedent is no different: *Action Professional Service* **v.** *Kiggins*, 458 N.W.2d 365, 366 (S.D., 1990): $217; *Johnson* **v.** *Statewide Collections, Inc.*, 778 P.2d 93, 96 (Wyo., 1989): $144.99; *Venes* **v.** *Professional Service Bureau, Inc.*, 353 N.W.2d 671, 673 (Minn.App., 1984): $552.40; *Phillips* **v.** *Periodical Publishers' Service Bureau, Inc.*, 369 S.E.2d 154, 155 (S.C.App., 1988), *cert. granted*, 300 S.C. 444, 388 S.E.2d 787 (1989): $8.05.

The foregoing decisions conclusively demonstrate that, contrary to the inferences of the court below, due process clearly does not hang by any thread so tenuous as the mere

monetary amount at issue. Thus, to the extent the court's decision to untimely restrict the time for trial was based upon this shortfall from what it apparently deemed to be a "meritorious," albeit notably undefined, amount at issue, particularly where the court referred to amounts ranging from twice to twenty times that of its jurisdiction to decide, Defendant was concomitantly denied substantive and procedural due process and unduly prejudiced thereby. The inappropriateness of the rationale behind the court's comment in this regard was soundly rejected by the Supreme Court years ago when it considered an analogous fact situation regarding the necessity of making findings on the material facts as opposed to reasonings of the court's conscience. In reversing the decision of the trial court and vacating the judgment on remand in that respect, the Court said:

> "The necessity of making findings of fact on the disputed issues is given emphasis in this case by the statement we have quoted above, made by the trial judge: that although he would not allow recovery he 'feels that the plaintiff has a moral entitlement' to additional money. This is particularly so because this case is in equity wherein the plea for redress is directed to the conscience of the court. The observation referred to impresses us as a candid indication that the matter was not settled to his satisfaction. However well intentioned, it seems a futile suggestion in the face of difficulties which drove the parties to a lawsuit involving in excess of $25,000. It appears not to have been helpful to the parties, nor to the court in dealing with the already sufficient perplexities which this situation presents." ***LeGrand Johnson* v. *Peterson***, 18 Utah 2d, at 262, 420 P.2d, at 616.

With respect to due process issues such as the one on appeal here, the Utah Supreme Court has said:

> "That the rights of individuals and the assurance that they will be safeguarded by the courts and the process of law are considered essential to the maintenance of what we are pleased to call our well-ordered society is shown by the inclusion of Art. I, Sec. 11 in our Utah Constitution:
>
> > 'All courts shall be open, and every person, for an injury done to him in his person, * * * shall have remedy by due course of law, * * * and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party'."

See also ***Barnhart* v. *Civil Service Employees Insurance Co.***, 398 P.2d 873, 876 (Utah, 1965), *cited in* ***City of St. George* v. *Turner***, 860 P.2d 929, 932 (Utah, 1993). *Ibid.*

It is thus to be seen that the untimely restrictions placed upon the time for trial as imposed by the court below within mere hours of the scheduled trial time, which restrictions unduly and essentially deprived Defendant of the day in court to which she was unquestionably entitled, runs counter to both the expressed purpose and the spirit of our system of justice. By the court's own act it precluded itself from fulfilling its responsibility of remaining fully available to properly adjudicate all material issues and controversies presented by this case, and in doing so substantially impaired the rights of Defendant in particular to examine witnesses in prosecution of her counterclaim. The reticence with which this should, if ever, be done is further emphasized by realizing that such arbitrary discretion, even in advance of trial, substantially cuts into the procedural safeguards that otherwise our law so adequately provides for. But even more significant is the fact that a less clear and complete record results, thus impairing to a substantial degree the right to an accurate review of all the material facts on appeal.

The circuit court's error, as a matter of law, by untimely restricting the time for trial thus depriving Defendant of her rightful day in court to which she was clearly entitled, constituted an unreasonable denial of an essential, fundamental right. The resultant loss of due process and equal protection carried with it substantial harm and prejudice where the record is devoid of facts it should otherwise contain. For the reasons set forth herein, the judgment rendered against Defendant is, therefore, due to be reversed; the error not being harmless.

(Respecting Part A)

ISSUE #2: Did the circuit court err in granting judgment to Plaintiff where Defendant had previously raised, in her amended Answer pleadings pursuant to Rule 8(c), U.R.C.P., the affirmative defense that Plaintiff's claims were stale and thus barred by the doctrine of waiver, laches, and estoppel?

The gravamen of Plaintiff's complaint stems from the assignment only in 1991 of an

alleged debt purported to be then owed by Defendant to Plaintiff's Assignor. However, the underlying issue in this case, and one that merits review on appeal, is the fact of Assignor's breach of a prior contractual agreement with Defendant, dated 31 March 1981, which breach remained uncured and unaccounted for through the date of trial, thus antedating Plaintiff's assignment by nearly a full decade. As of 4 October 1982, Plaintiff's Assignor was then indebted to Defendant in the principal amount of at leasst $1,235.26, exclusive of interest accruals since that time, and was thus guilty of having unclean hands. At trial, Defendant was able to preponderate on the fact that via her signed contract, Plaintiff's Assignor was so indebted and had thereafter failed at all times during the pendency of this action to account for, record, and/or credit to Defendant's dental account all or even any part of this long-standing, prior contractual indebtedness.[9] Assignor's dental services rendered to Defendant were completed on or about 25 September 1984 and Plaintiff proved, as well, using Assignor's own statement that the final insurance payment of $1,250 had, in fact, been received by Assignor on or about 22 March 1985.[10] At no time thereafter did Assignor ever provide to Defendant a complete accounting of the total dental charges for services rendered in her behalf, nor any record of the insurance payments received with respect thereto, or with regard to Assignor's direct negotiations with Defendant's carrier, nor the application of all or any part of the amounts due under its

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[9] See R.T., p. 74, lines 8-9: "...[A]t any rate you win on that one. For that I deducted twelve thirty-five. ..." See also, R.T., pp. 76-77, lines 21-25 and line 1, respectively: "The big ticket item that changes it a lot is the $1,235 and that's what -- and you won on that one, that's what trials are for. I'm convinced that at least your subjective impression was you're going to get a $1,200 credit for that machine. That may or may not have been the deal but they weren't here to contest it so that's the way that goes."

[10] See R.T., p. 75, line 20: "...[t]he eighth payment of 1,250,...". See also R.Idx., Defendant's trial exhibit of Assignor's handwritten statement indicating this amount having been paid as a part of her total of payments rendered, and also as demonstrated in her "summary of payments." (R.Idx., 256.)

original contract default. The evidence in this case also reflects, in addition, that at some indeterminate point in time prior to 31 December 1990, Plaintiff's Assignor purged its records of information pertaining to Defendant's account.[11] Thereafter, on 25 April 1991, or more than 6-1/2 years after the completion of Defendant's dental treatments, and more than 10 years after Assignor's contractual default to Defendant, Assignor elected to assign to Plaintiff the alleged debt purported to be owed by Defendant for the purposes of collection. Owing to Assignor's inexcusable delay in asserting its claim and the resultant prejudice and disadvantage suffered by Defendant thereby, it was therefore proper for Defendant, upon answering Plaintiff's complaint, to assert the equitable affirmative defense that "Plaintiff's claims are barred on the grounds of waiver, laches, and estoppel."[12]

The "'Doctrine of laches' is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." It is the "unreasonable or unexplained delay in asserting [a] right which works disadvantage to another. Laches requires an element of estoppel or neglect which has operated to prejudice of defendant."[13] In this regard, *Bouvier's*[14] indicates that:

> "'...[t]his doctrine is based upon the grounds of public policy which requires for the peace of society, the discouragement of stale claims,' ***Mackall* v. *Casilear***, 137 U.S. 556, 11 S.Ct. 178, 34 L.Ed. 776, and 'The question whether one is precluded from equitable relief by the staleness of his demand is for the court and not for the jury.' ***Raymond* v. *Flavel***, 27 Ore. 219, 40 P. 158. It goes on to state that 'Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time, and the mere

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[11] See Record Index ("R.Idx."), pp. 213-14, a computer-generated document entitled "Account Ledger Card." See page 1, line 1, Column 5: "Ref" "Purge."

[12] See Defendant's Amended Answer and Counterclaim, "Seventh Affirmative Defense," p. 5. *Ibid.*

[13] *Black's*, Abridged Sixth Ed., p. 606.

[14] *Bouvier's Law Dictionary*, 3 vol. ed., (1914).

> fact that suit was brought within a reasonable time does not prevent the application of the doctrine of laches when there is a want of diligence in the prosecution.' *Alsop* v. *Riker*, 155 U.S. 449, 15 S.Ct. 162, 39 L.Ed. 218; *Hagerman* v. *Bates*, 5 Cal.App. 391, 38 P. 1100. 'The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances, the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner.' *Townsend* v. *Vanderwerker*, 160 U.S. 171, 16 S.Ct. 258, 40 L.Ed. 383; *McIntire* v. *Pryor*, 173 U.S. 38, 19 S.Ct. 352, 43 L.Ed. 606; 'It is not measured by the statute of limitations.' *Alsop, supra.*"

Laches embodies the fundamental principle that "he who seeks equity must do equity," therefore, "having sought equity, it is incumbent upon plaintiff to do equity." *Coleman Co., Inc.* v. *Southwest Field Irrigation Co.*, 584 P.2d 883, 884; (Utah 1978); *accord*, *Carbon Canal Co.* v. *Sanpete Water Users Ass'n.*, 425 P.2d 405, (Utah, 1967). As Defendant properly asserted the affirmative defense of laches in her amended answer and counterclaim, she duly met her burden under the rationale of *Walker* v. *Walker*, 404 P.2d 253, 257 (Utah, 1963), wherein the Supreme Court stated:

> "Burden of taking some affirmative action should be on him who accuses the other of delay and unless he has taken such action or in some manner put other party on notice that action is required, he cannot take advantage of the delay." *Id.*

In further clarification of the foregoing as respecting the instant case, it is instructive to note the decision of the Supreme Court of Hawaii wherein it stated:

> "Equitable doctrine of laches applies where long acquiescence in assertion of adverse rights has occurred, ... or when, during inexcusable delay evidence has become obscured and, under circumstances of case, it is too late to ascertain merits of controversy." *Anderson* v. *Anderson*, 585 P.2d 938, 947 (Hawaii, 1978).

See also *Brabender* v. *Kit Mfg. Co.*, 568 P.2d 547 (Mont., 1977) ("Laches" is negligence in assertion of a right; it exists when there has been an unexplained delay of such duration or character as to render enforcement of asserted right inequitable); *Clark* v. *Chipman*, 510 P.2d 1257, 212 Kan. 259 (1973) ("Laches" is an equitable device designed to bar stale claims and courts of equity will regard long passage of time in asserting claims with disfavor apart from any particular statute of limitations); *Longshaw* v. *Corbitt*, 420 P.2d 980, 4 Ariz.App. 408 (1966) (The elements necessary to constitute laches are lack of diligence on the part of one and injury to another due to lack of diligence).

The record in this case clearly indicates that Plaintiff's claims suffered from the loss of relevant evidence as the proximate result of Assignor's inexcusable delay in the assertion of adverse rights, as indicated in the following excerpts:

> "The Court: ...[T]hat's why I'm saying that we're kidding ourselves if you think no matter how able or wonderful you can be and how attentive and I'd really try to listen we'd spend the next week trying to pour through this but we can't discover it." (R.T., p. 64, lines 21-25.)

And further on the court said:

> "...[W]e're talking about purged computer records and old records and at least what initially was kind of a handshake deal too, based on a separate business acquaintance and all of that lends itself into not being able to have the kind of facts I know that the attorneys would like to have in presenting a case." (R.T., p. 72, lines 20-25.) "...[A]nd what I've done is taken all of the extant records, understanding that there is a hole prior to 1986 - - 1984, I'm sorry." (R.T., p. 73, lines 10-12.) "...[I]t is the position of the Plaintiff that the $515 either wasn't paid or it was already reduced somewhere back in the olden days before I can get the records." (R.T., p. 74, lines 14-17.) "...[T]hat may or may not have been the deal but they weren't here to contest it so that's the way that goes." (R.T., p. 77-78, lines 25, 1, respectively.)

Thus it is evident that not only was Assignor negligent in asserting and assigning its claim for an unconscionable period, but as a result of that negligence Plaintiff's case suffered markedly from the loss of evidence and the disappearance of at least one material witness with whom Defendant had dealt in 1982:

> "Q. (By Mr. Stanton) When Associated Dental Products changed names to Oral Dental Health you spoke to someone about the machine. Who did you speak with?
> "A. (Mrs. Murdock) The owner of Associated Dental Group.
> "Q. Who was that?
> "A. His name was Craig. I can't remember his last name, it's been 12 years ago, but he signed it and you can't hardly read his signature, but I do have a document.[15]

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[15] The "document" here testified to by the Defendant is the Diversified Office Systems, Inc. Sales Agreement ("Defendant's Contract") referred to at the outset of the Statement of the Case, which the court refused to admit into evidence at trial, notwithstanding the fact that Defendant prevailed on this evidence and was awarded a principal-only credit of $1235.00 therefor "by a preponderance of the evidence." See R.T. p. 39, line 13, through p.

(continued...)

"Q. And it went from Associated Dental to Oral Dental Health?
"A. Yes.
"Q. Was he an owner in Oral Dental Health?
"A. He owned it.
"Q. Okay.
"Mr. Mulliner: I am going to object to this, Your Honor. The document that's been admitted establishes that Oral Health Center is Kent Davis and Oral Dalton. This other person, I have no idea who he is, I have no idea where we're going with this. If she signed - - " (R.T., pp. 44-45, lines 10-25, 1-3, respectively.)

The testimony elicited here concerned events which antedated Assignor's assignment to Plaintiff of its claim by nearly a decade thus resulting in counsel's confusion, and further demonstrating the underlying grounds and justification for Defendant's affirmative defense of laches based upon Assignor's lack of diligence and unclean hands with the resultant injustice certain to occur if Plaintiff's claims are not held barred. Moreover, the court's reference to "...[w]hat initially was kind of a handshake deal too..." is also in error as the agreement to trade Assignor's default on Defendant's contract was secondary to the contract itself. The fact that Assignor failed to keep its commitment under the "handshake deal," so-called, had no legal effect upon its prior contractual obligation to Defendant, thus further proving its unclean hands.

As indicated herein, the availability of the equitable defense of laches is contingent upon the establishment of two elements: (1) the lack of diligence on the part of plaintiff; and (2) an injury to defendant owing to such lack of diligence. ***Papanikolas Brothers Enterprises* v. *Sugarhouse Shopping Center Associates***, 535 P.2d 1256, 1260 (Utah, 1975); *cited in* ***Leaver* v. *Grose***, 610 P.2d 1262, 1264 (Utah, 1980); ***Plateau Mining Co.* v. *Utah Division of State Lands and Forestry***, 802 P.2d 720, 731 (Utah, 1990); ***Sandy City* v. *Salt***

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[15](...continued)
52, line 3, and pp. 73-74, lines 22-25 and 1-10, respectively. A copy of that document, together with the Diversified delivery receipt, the Associated Dental Group check stub, and the business card bearing the name "Craig," are annexed hereto in Appendix II.

Lake County, 827 P.2d 227, 230 n.5 (Utah, 1992). Both of those elements are abundantly evident in this case, together with the additional factors of the loss of evidence, the unavailability of a material witness named "Craig," and the unclean hands of Plaintiff's Assignor.

In sum, laches developed as an equitable analog to legal statutes of limitation and operates, when found, as a bar to an action, not as an element to diminish an award. *See G. Dobbs, Remedies*, 43. "The basis of laches in equity is unreasonable delay and lack of diligence extending for so long a time or under circumstances that it would be inequitable to grant relief." ***Rhoads* v. *Albertson's, Inc.***, 574 P.2d 114, 116 (Colo.App., 1977), *reversed*, 582 P.2d 1049. "Laches bars a recovery when there has been a delay by one party causing a disadvantage to the other party." *Papanikolas*, *supra*, 535 P.2d at 1260. The record in this case clearly demonstrates Assignor's long acquiescence in assertion of adverse rights pursuant to an alleged claim against Defendant where the record in this case shows that Assignor waited for more than 6-1/2 years before electing to act in that regard, and where, during such inexcusable delay, evidence has become obscured and material witnesses, other than Defendant, having first-hand knowledge of the facts were not available. *Anderson*, *supra*, 585 P.2d at 947. As such, Assignor's alleged claim was barred from the outset by the equitable doctrine of laches and that guilt was not overcome by the mere assignment of that claim to a third party collection agency. Thus, Defendant properly raised this affirmative defense in her pleadings where Plaintiff's claims were stale and, therefore, barred *ab initio*. Accordingly, the judgment should be reversed with instructions to vacate.

ISSUE NO. 3: Did the circuit court err by denying Defendant equal protection under the law where it awarded assignee Plaintiff the benefit of interest pursuant to Assignor's contract while precluding Defendant from calculating like interest amounts pursuant to her unambiguous contract upon which Assignor had previously defaulted in order to obtain an equal, or greater, offset against assignee Plaintiff's claims as provided pursuant to Rule 13(c), U.R.C.P.?

Notwithstanding Defendant's direct testimony regarding *her* clearly unambiguous contract, dated 31 March 1982, upon which Plaintiff's Assignor had originally defaulted nearly six months prior to Defendant's first visit following negotiations to effect a trade for dental services in lieu of Assignor's payment therefor (see footnote #16, *ante*), and further notwithstanding the fact that Defendant was able to establish that no credit for those amounts had ever been applied towards her dental charges in consideration of Assignor's default, the court, nevertheless, refused to admit Defendant's contract into evidence despite her argument to the contrary. At one of several inaudible sidebars that occurred during the course of trial, this issue was discussed. Defendant argued that if her contract were not admitted as evidence and the interest terms therein were not going to be allowed in calculating an equal or greater offset against Assignor's contract, except for the principal amount as it existed 12 years previous, then neither should Assignor's contract receive the benefit of interest calculations in determination of the final judgment award. To hold otherwise would be to stand the doctrine of equal protection on its head. Moreover, while ignoring the fact that Defendant's contract provided for an equal imposition of interest, the court reasoned, rationalized, and took great pain to explain to Defendant why Assignor's contract should be upheld:

> "The Court: Now Mr. Stanton on several occasions has rather eloquently argued, and I want you to know that he didn't surrender the position, he argued that - - so I don't want you to fault him at all. I take responsibility for the ruling - - he asked that I not allow the one and-a-half percent interest on the declining balance, claiming that it's their fault, sort of, because they were so dilatory in making insurance claims or they - - they were, rather, insurance company and that sort of thing.
>
> "I guess all I can tell is that, again, that's what, not only are lawsuits determined and filed so you can contest facts but also there's some legal arguments that attorneys made and it does seem to me that as between apportioning, you know, who bears the loss of use of money and you signing a contract has to mean something. I'm already finding all kinds of things like that there's a sewing machine - - a postage machine. I tried to give you the benefit of every reasonable construction but I just really can't close my eyes and simply rule on the one and-a-half percent. I think I need to - - this is,

> after all a business relationship, it's not just judgment. And it seems to me that there's just a time value of money that's different than in paying services in 1992 and now in 1994 than it is paying for services in 1984.
>
> "We are talking about an old account, so I can - - I think we'd really be - - I would not be doing any justice to the contract, Ms. Murdock. I know that you probably have some emotional credit that's not recorded. I do want you to know that Mr. Stanton made the appropriate legal arguments and pleasantly and persistently asked me to rule otherwise." (R.T., pp. 78-79, lines 9-25 and 1-13, respectively.)

In this regard the court erred for several reasons: ***First***, the exclusion of Defendant's contract from evidence constituted a denial of equal protection where Assignor had previously agreed to be bound by its terms upon execution; ***Second***, Defendant was unduly prejudiced by the imposition of interest under Assignor's contract while being denied the same benefit pursuant to the terms of her contract in order to calculate an equitable offset; ***Third***, although Defendant had agreed to trade an equivalent amount of dental services to cure Assignor's default, that default remained uncured where Assignor thereafter failed to account for or credit Defendant's account with such amounts and such failure did not operate to extinguish Assignor's obligations under the terms of Defendant's contract; ***Fourth***, by excluding Defendant's contract from evidence, the court failed to properly interpret the same, thereby depriving Defendant of due process and equal protection; and ***Fifth***, by limiting Defendant's award to the 1982 principal-only amount then due as a matter of law, the court thereby failed, in addition, to determine what the parties intended when Assignor executed Defendant's contract.

Because Defendant's contract is highly relevant to the facts in this case, due process and fundamental fairness required at least a reasonable interpretation thereof. To the extent that Defendant's "w[i]n on that one"[16] constituted an "interpretation" as a matter of law without regard for extrinsic evidence, the court's interpretation is afforded no

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[16] R.T., p. 76, line 22.

particular weight on appeal. In that regard, this Court has said:

> "If the trial court interprets a contract as a matter of law without regard for extrinsic evidence, we afford its interpretation no particular weight. *Seashores, Inc. v. Hancey*, 738 P.2d 645, 647 (Ut.Ct.App., 1987). 'The primary rule in interpreting a contract is to determine what the parties intended by looking at the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole.' *Sears v. Riemersma*, 655 P.2d 1105, 1107-08 (Utah, 1982)." *Cf. Baker v. Western Surety Co.*, 757 P.2d 878, 881 (Ut.Ct.App., 1988).

See also *Plateau Mining Co. v. Utah Division of State Lands and Forestry*, 802 P.2d 720, 725 (Utah, 1990); *Utah Valley Bank v. Tanner*, 636 P.2d 1060, 1061-62 (Utah, 1981); *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah, 1982).

As is the case with Assignor's contract, under the equally unambiguous terms of Defendant's contract it also provides as follows: "...[t]he purchaser agrees to pay a reasonable attorney's fee and agrees to pay interest on past due accounts at the rate of 1-1/2% per month, 18% per year." As this provision clearly constitutes an essential element of "all of its parts," by the court's failure to allow "what the parties intended" when the contract was executed that interpretation should thus be afforded "no particular weight" on this appeal. To the extent the court erred by summarily excluding Defendant's contract from evidence, the judgment should be reversed and remanded with an order directing that Defendant's contract be admitted in the record as relevant evidence, and that a proper interpretation thereof be made for calculation of the amount of interest to be applied, consistent with its terms as the parties intended, as an offset against the amount awarded by the court under the terms of Assignor's contract, as sought in Defendant's counterclaim pursuant to Rule 13(c).

ISSUE NO. 4: Did the circuit court err in granting judgment to Plaintiff where it calculated Plaintiff's claims by relying on defense exhibit incorporating Assignor's unproven amounts in light of finding that Plaintiff's case suffered from lack of adequate evidence in the record?

Plaintiff commenced its action by praying for "judgment against Defendant in the amount of $3,976.64, interest, costs, and such other and further relief as to the Court seems

meet in the premises." Paragraph 3 of Plaintiff's complaint states as follows:

> "3. Defendant is indebted to Oral Health Center (the assignor) for professional services and the amount due as of November 4, 1991, is the sum of $3,976.64." (R.Idx. p. 1 & 2.)

Paragraph 2 thereof provides:

> "2. The debts herein sued upon were assigned to Plaintiff by written assignment. The entire amount thereof is past due and owing." *Ibid.*

At trial, however, the record shows that Plaintiff was unable to prove these allegations as the proximate result of Assignor's inexcusable delay in asserting its claim, together with its proven inaccurate accounting and recordation methods, the loss of relevant evidence, and the unavailability of a material witness having first-hand knowledge of the facts from the outset. As a result of these facts Plaintiff was awarded only $528.00, plus an indeterminate amount of interest to be calculated over a period certain and added thereto. But even this amount was arrived at in error where the court based its findings not on the amount set forth in Plaintiff's complaint, rather, it chose to rely, instead, on the erroneous information set forth in the hand-written monthly statements originally provided to Defendant by Assignor in 1984 and 1985 in arriving at "the highest gross amount"[17] the court could ascertain from that "evidence," such being the sum of $5,328.00, rather than the $3,976.64 Plaintiff had sued for. Thus, Plaintiff (and Assignor) received, at the discretion of the court, the benefit of an added windfall of $1,350.00 more than they had even sued for. This, of course, more than totally negated the $1,235.00 credit Defendant had received as a principal-only award for Assignor's original default on her contract. Had the court

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[17] See R.T., p. 73, line 5, through p. 78, line 8. Notwithstanding this ruling in its favor, Plaintiff nevertheless prepared findings of fact and conclusions of law, dated 5 January 1995, setting forth therein a judgment amount, not of $528.00, but "...[i]n the principal sum of $1,761.49, $2,285.85 accumulated interest, and costs incurred herein." This set in motion a post-trial dispute which was only resolved at a hearing 5-1/2 months after trial on 5 May 1995, and only then so this matter could be brought up on this appeal.

properly based its calculations on the amount set forth in Plaintiff's complaint, as assigned and alleged by Assignor, the resultant amount would have been $822.00 in favor of Defendant, as derived from the difference between the $1,350.00 windfall and the $528.00 judgment in favor of Plaintiff, the interest amounts notwithstanding. In arriving at this "highest gross amount," however, the court had to admit that "...[i]t's kind of a fiction how I arrived at it in a sense." (R.T., p. 80, lines 16-22.) By basing its calculations on this "highest gross amount" rather than the original amount assigned and subsequently sued upon by Plaintiff, the court erred further where it had already determined that the amount defaulted upon by Assignor under Defendant's contract had never been credited to Defendant's account, hence her "w[i]n on that one."

As it was established that as of 4 October 1982, Assignor was indebted to Defendant in the amount of at least $1,235.00, she should have started with a credit balance of that amount, against which dental charges would have been properly been deducted as they were incurred. Where it was determined at trial that this had not been the case, it was plain error for the court to thereafter conclude that the $5,328.00 figure was a valid point from which to begin its calculation of the final judgment amount, and particularly where the record reflects Assignor's own hand-written document indicating the total charges incurred by Defendant to be $4,975.00, between the dates of 4 October 1982 and 25 September 1984. (R.Idx., #212.) (See R.T., p. 73, lines 12-21.)

Accordingly, the judgment should be reversed and the court's calculations reviewed for a proper determination consistent with the evidence.

ISSUE NO. 5: Did the circuit court err by finding that Defendant had failed to prove, "by a preponderance of the evidence," that she had a cause of action pursuant to the FDCPA and the UCSPA where she was precluded from prosecuting her claims thereunder as the proximate result of the time restraints imposed for trial?

At the conclusion of trial of Part A regarding the subject matter of Plaintiff's

complaint, Defendant had to remind the court of her counterclaim alleging Plaintiff's violations of the Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. § 1692 *et seq.*, and the Utah Consumer Sales Practices Act ("UCSPA") § 13-11-19 *et seq.*, where the court had previously denied Plaintiff's motion in limine in this regard at the outset of the proceedings.[18] As the restricted time allotted for trial had already been consumed in its entirety, Defendant suggested that since Plaintiff's answers to discovery were previously published and admitted into evidence, and where it appeared that Plaintiff had admitted to the alleged violations therein, that the court review those answers and base its decision in comparison with the provisions of the FDCPA and make its ruling accordingly. At this the court then stated:

> "Will you just give me a Reader's Digest -- what do you believe -- what is the conduct that violated the -- ... I've got your counterclaim and exhibits."
>
> (R.T., p. 86, lines 17-19, 24-25.)

Following a brief discussion in this regard the court expressed some doubts:

> "Well, okay. Help me a little bit. I'm going to tell you right now that I don't see the violation. If you want -- I see they sent a letter --". (R.T. p. 92, lines 9-11.) (The court was here referring to one of two letters sent by Defendant to Plaintiff during the pendency of this action.)

Defendant subsequently offered to submit a brief further outlining the specific provisions of the FDCPA in detail, which the court declined, stating:

> "I think it would be fair if you just told me right now and let Mr. Mulliner argue back right now. ... Tell me, why is that a violation?" (R.T., p. 92, lines 14-15; line 20.)

Defendant proceeded to explain to the court that the FDCPA establishes the violations and that the specific violations alleged to have been committed by Plaintiff were

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[18] R.T., p. 4, lines 14-16; p. 11, lines 20-25.

listed in the counterclaim presently before the court.[19] Notwithstanding this explanation and attempt to direct the court's attention to the specific allegations set forth in Defendant's counterclaim pleadings and exhibits then before the court, and having previously referred the court to the concurring notes prepared by its law clerk on the subject,[20] the court proceeded to demonstrate its fundamental misconception of the provisions of both the FDCPA and the UCSPA by the following statement wherein the court not only combined the provisions of the acts just stated, but hopelessly confused the issues instead by mixing in the largely off-point matters involved in Part A regarding the subject matter of Plaintiff's complaint:

> "Shouldn't rely on a 1982 agreement on a postage machine that I give to her if you're asking me about fairness, and I do understand that the statute speaks to liberally and that sort of thing, but there's nothing in here that jumps up and down and says that your client was misled or made some payments or was browbeaten to do anything. She certainly wasn't browbeaten into anything, she went out and got a very fine attorney to represent her." (R.T., p. 93, lines 14-21.)

Where it was thus evident that the court had completely confused the separate nature of the provisions designated in Part A relating to Plaintiff's complaint and those regarding the issues and allegations contained in Part B counterclaiming Plaintiff's alleged violations of both the FDCPA and the UCSPA, together with the fact that no testimony with regard to Plaintiff's alleged violation of these acts was going to be permitted owing to the lack of time to fully prosecute the matter, the following conversation ensued:

> "Mr. Stanton: (for Defendant) All right. We've made our allegations in the counterclaim, they're specific in there for you. We've provided the admissions and then the Fair Debt Collection Practices Act based upon those, make your ruling and then we'll go from there."

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19 R.T., p. 92, lines 21-22; p. 93, lines 12-13.

20 R.T., pp. 7-8, lines 23-25 and 1-24, respectively. See Appendix for copy of handwritten notes of law clerk, Wayne D. Jones, which Defendant moved to publish. and admit into evidence.

"Mr. Mulliner: (for Plaintiff) And we admit we sent those documents. We deny that those documents in any way violate the Act and I take it that that's your ruling, that they don't violate the Act." (R.T., pp. 93-94, lines 22-25, 1-5.)

Further discussion ensued between counsel for both Parties and the court, but no examination of witnesses transpired concerning Defendant's counterclaim allegations, the court having previously decided as follows:

"Again, let me just say for those of you who are interested in Ms. Murdock's behalf and for the collection agency wondering why it is we don't proceed with the trial and do more testimony, that this is just not the kind of case that anyone's oral testimony that's here today could offer any additional help to us." (R.T., p. 73, lines 5-10.)

Following the brief, cursory discussions regarding Defendant's allegations pursuant to the provisions of the FDCPA, the court then found as follows:

"Do you have anything else? Okay, then I'm not going to deny plaintiff's claim for relief under the counterclaim and based on what has been presented to me in Exhibit A, I'll find that the defendant failed to meet its burden of proof of providing evidence to the Court." (R.T., p. 99, lines 12-16.)

Whereupon, Defendant then queried the court as follows:

"Mr. Stanton: Is that based upon admissions as well or just upon Exhibit A?"

"The Court: It's based on everything that you say and what you didn't say. It's based on the evidence that I have before me at this time (inaudible) I was told to go back to my room and read or something. And so at this time then I'll just - - the judgment on the counterclaim will stand but we're going to let that - - hold that for this few days."[21] (R.T., p. 99, lines 17-24.)

Following this exchange a short sidebar occurred where the exhibits to be published were discussed. In that regard the court stated:

"The Court: Now let's see, I've been handed some exhibits. Let's see -- the one exhibit. Tell me what you want. What we ought to do is very carefully retain the correct exhibits in case Mr. Stanton wants to have the appellate court look at it. (R.T., p. 100, lines 5-9.) ... I'll hand that to you. Is that all right there? That's another case I've got. You've got that one exhibit." (Whereupon this portion of the hearing was inaudible.) ...

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[21] In the latter part of this statement, the court was referring to the time alloted for calculaing the interest amounts previously awarded to Plaintiff at trial, which award constitutes the subject matter of Issue No. 5 herein.

"Do you move to publish?"
"Mr. Stanton: Yes, admit those." (Inaudible.) (R.T., 100, lines 20-25.)
"The Court: If you decide that you want the appellate court to look at that, I'm certainly not -- I'll do everything I possibly can to make the record clearer." (R.T., pp. 101, lines 1-3.) ... So, well, we ought to have those and the plaintiff's answers to defendant's requests for admissions and certificate of service, response to her second set. These are the items you wanted.
"Mr. Stanton: Exhibit 1 and Exhibit 2."
"The Court: All right." (R.T., 101, lines 6-11.)

In order for the Court of Appeals to more fully understand the "fundamental misconception"[22] of the court below respecting its conclusory analysis of Defendant's counterclaims under the FDCPA and the UCSPA, it must first understand something of the congressional intent underlying its passage of the FDCPA and its purpose for authorizing even greater protection under state laws -- in this case the UCSPA.[23] Owing to the lack of abundance of Utah decisional law regarding the FDCPA, it is first deemed appropriate to consult the federal decisions that have addressed these issues and, secondly, various other state supreme and appellate court decisions so published.

The FDCPA traces its genesis to section 5 of the Federal Trade Commission Act (the "FTC Act") of 1914. 38 Stat. 717, ch. 311 (15 U.S.C. § 45 *et seq.*) Section 5(a)(1) of the FTC Act reads:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

In passing the Act, doubtless Congress was aware of the language rendered in *Florence Manufacturing Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2nd Cir., 1910), an unfair

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[22] The phrase employed by the Ninth Circuit Court of Appeals in its decision rendered in *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222, 1225 (9th Cir., 1988).

[23] See Senate Report No. 382, 95th Cong., 1st Sess. *reprinted in* in 1977 U. S. Code Cong. Admin. News 1695, 1700 ("The Committee believes that this law ought not to foreclose the States from enacting or enforcing their own laws regarding debt collection. Accordingly, this legislation annuls only 'inconsistent' State laws, with stronger State laws not regarded as inconsistent.") See also, § 13-11-19(2) Utah Code Ann.

practices case, wherein the court had held:

> "The law is not made 'for the protection of experts, but for the public -- that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions'."

See also, *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679 (2nd Cir., 1944); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-3 (11th Cir., 1985); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1489 (M.D.Ala., 1987); *Clomon v. Jackson*, 988 F.2d 1314, 1318-19 (2nd Cir., 1993) (same). The FTC Act as initially enacted thus prohibited "unfair methods of competition." In 1938, Congress adopted the Wheeler-Lea Amendment, 52 Stat. 111, which added the phrase "unfair or deceptive acts and practices" to the original language. This was a legislative abnegation of the holding of *F.T.C. v. Raladam Co.*, 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1930), restricting the coverage of the original enactment to "protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree..." *Id.* at 647, 51 S.Ct. at 590, 75 L.Ed. at 1329. In *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321, 86 S.Ct. 1501, 1504, 16 L.Ed.2d 587, 591 (1966), a unanimous Supreme Court recognized that the Federal Trade Commission ("FTC") is endowed with "broad powers to declare trade practices unfair." The FTC has used both its legislative and adjudicatory powers to find deceptive collection practices unfair. It has adopted guidelines against debt collection deception.[24] This infusion of FTC law and regulations satisfies the fundamental due process insistence "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222, 227 (1972). The constitutional adequacy of the warning of proscribed conduct should be measured not only by common intelligence, but

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[24] 16 C.F.R. Part 237. See note 28, *supra*.

also by "common practice." *U. S. ex rel. Shott* **v.** *Tehan*, 365 F.2d 191, 198 (6th Cir., 1966), *cert. denied*, 385 U.S. 1012, 87 S.Ct. 716, 17 L.Ed.2d 548 (1967). Ordinarily, two elements must be proved to establish a prima facie case of unfair or deceptive practices: (1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred. An act or practice is deceptive or unfair if it has the mere capacity or tendency to deceive. *F. T. C.* **v.** *Raladam Co.*, 316 U.S. 149, 152, 62 S.Ct. 966, 968, 86 L.Ed. 1336, 1340 (1942). See also, *Resort Car Rentals Sys., Inc.* **v.** *F. T. C.*, 518 F.2d 962, 964 (9th Cir., 1975) *cert. denied sub nom.*, *MacKensie* **v.** *U. S.*, 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975); *Thiret* **v.** *F. T. C.*, 512 F.2d 176, 180 (10th Cir., 1975); *Spiegel, Inc.* **v.** *F. T. C.*, 494 F.2d 59 (7th Cir., 1974) *cert. denied*, 419 U.S. 869, 95 S.Ct. 175, 42 L.Ed.2d 140 (1974). An act or practice need not be "deceptive" to be "unfair." Unfairness will be determined by a variety of factors, including:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."

F. T. C. **v.** *Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5, 92 S.Ct. 898, 905, n.5, 31 L.Ed.2d 170, 179, n.5 (1972). Threats by debt collection agencies of imminent legal action when no such action is actually contemplated is a deceptive act or practice. *Trans World Accounts* **v.** *F. T. C.*, 594 F.2d 212, 215, (9th Cir., 1979); *Hearst Corp.*, 82 F.T.C. 951, 954 (1966). Harassment of debtors by telephone calls to them, their relatives or their employers constitutes an unfair act or practice. *Hearst Corp.*, 82 F.T.C. 1792, 1797 (1973); *Neighborhood Periodical Club, Inc.*, 81 F.T.C. 93, 101 (1972). A misrepresentation by a debt collection agency that failure to pay an alleged debt will result in impairment of one's credit rating has been held to be an unfair and deceptive act or practice. *Hearst Corp.*, 82

F.T.C. 1792, 1797 (1973); *Neighborhood Periodical Club, Inc.*, 81 F.T.C. 93, 101 (1972); *Key Learning Systems, Inc.*, 81 F.T.C. 296, 306 (1972); *Book Club Guild, Inc.*, 65 F.T.C. 785, 790 (1964).

In more recent years the FTC Act has since been amended several times. In 1968 the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601 *et seq.* was enacted. In 1976 Congress enacted the Truth in Lending Act ("TILA"), 15 U.S.C. § 1640 *et seq.* These were followed by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* (1970), and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* (1977) (Supp. IV 1980). Under the latter, the draftsmen clearly stated that "The primary persons intended to be covered are independent debt collectors." S.Rep.No.382, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S.Code Cong. & Admin. News. *Ibid.*, at 1697. See *In re Scrimpsher*, 17 B.R. 999, 1011 (Bkrtcy.N.D.N.Y., 1982), *Id.* These basic principles of consumer protection law took on their modern formulation in the years following the FTC Act. In this regard the Second Circuit Court of Appeals stated:

> "'In evaluating the tendency of language to deceive, the Federal Trade Commission should look not to the most sophisticated readers but rather to the least.' *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 872 (2nd Cir., 1961). In recent years, as courts have incorporated the jurisprudence of the FTC Act into their interpretations of the FDCPA, the language of *Exposition Press* has gradually evolved into what we now know as the least-sophisticated-consumer standard. *See, e.g. Jeter*, 760 F.2d at 1174-75; *Baker*, 677 F.2d at 778." *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2nd Cir., 1993).

Thus has evolved the original language of *Florence* and its progeny relating to "...[t]he public -- that vast multitude which includes the ignorant, the unthinking and the credulous...". See also *Wright v. Credit Bureau of Georgia, Inc.*, 548 F.Supp. at 599; *Kimber v. Federal Financial Corp.*, 668 F.Supp. at 1489; *Swanson*, *supra*, 869 F.2d 1222, 1225; *Clomon*, *supra*, 988 F.2d at 1318-19. In *Jeter*, 760 F.2d at 1175, the Eleventh Circuit concluded, in pertinent part:

> "Because we believe that Congress intended the standard under the FDCPA to be the same as that enunciated in the relevant FTC cases ... we adopt the ***Exposition Press*** standard of 'least sophisticated consumer' as previously followed by the federal courts in ***Baker***, *supra* and ***Bingham***, *supra*."

This premise was based, in part, upon ***Jeter's*** reliance on the Alaska Supreme Court's decision in ***State v. O'Neill Investigations, Inc.***, 609 P.2d 520, 530 (Alaska, 1980). In that case the court disagreed with O'Neill's contention that "...[t]he recent enactment of the federal Fair Debt Collection Practices Act, ... which specifically prohibits all false, deceptive, misleading, unfair or harassing collection practices, is evidence that such practices were not prohibited by prior federal law." In answer to this contention the Alaskan Court said:

> "This claim ignores the new rights and remedies created by the Fair Debt Collection Practices Act: consumers now have a private right of action against creditors unavailable under the Federal Trade Commission Act. The new act *expands* already existing Federal Trade Commission jurisdiction over unfair or deceptive acts and practices of collection agencies; it is not written on a clean slate. The Federal Trade Commission's prior exercise of jurisdiction in this area is entitled to great weight, ***U. S. v. Shreveport Grain & Elevator Co.***, 287 U.S. 77, 84, 53 S.Ct. 42, 44, 77 L.Ed. 175, 179 (1932), and leads to the conclusion that the new Act merely supplements the [FTC Act]...". (emphasis in original.)

In deciding a case of first impression under the FDCPA, the Supreme Court of Wyoming observed that primary enforcement for violations of the Act continued to be vested in an aggrieved debtor, as was the case in the Truth in Lending Act, rather than in the Federal Trade Commission as before:

> "Administrative enforcement of the FDCPA is assigned to the Federal Trade Commission, 15 U.S.C. § 1692*l*, but the primary enforcement, in order to eliminate the objectionable practices, is self-enforcement by the aggrieved debtor acting as a 'private attorney general' through a civil action like that initiated by Johnson. 15 U.S.C. § 1692k; ***Zimmerman***, ***Staub***, ***Riveria***; ***West v. Costen***, 558 F.Supp. 564 (W.D.Va., 1983)." ***Johnson v. Statewide Collections, Inc.***, 778 P.2d 93, 99 (Wyo., 1989).

See also, ***Wright v. Collection Bureau of Georgia, Inc.***, 548 F.Supp. 591, 593 (N.D.Ga., 1982) ("The FDCPA, like many other consumer protection acts, is 'primarily self-enforcing'"); ***McGowan v. King, Inc.***, 569 F.2d 845, 848 (5th Cir., 1976) ("Scheme of Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, is 'to create a system of private attorneys general to aid its enforcement'"); ***Whatley, et al., v. Universal Collection Bureau, Inc.***, 525 F.Supp. 1204, 1206

(N.D.Ga., 1981) ("...Congress created a piece of consumer protection legislation with a 'private attorneys general' enforcement mechanism,...").

In reaching its determinations in *Johnson, supra*, the Wyoming Supreme Court had previously considered as follows:

> "We must then consider the merits of the several asserted grounds for recovery under the FDCPA. Congress adopted this legislation in 1977 to protect consumers from abusive, deceptive, and unfair debt collection activities by eliminating certain offensive and unethical practices in vogue with many third-party debt collectors. *Zimmerman* **v.** *HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir., 1987); *Staub* **v.** *Harris*, 626 F.2d 275, 62 A.L.R.Fed. 544 (3rd Cir., 1980); *Riveria* **v.** *MAB Collections, Inc.*, 682 F.Supp. 174 (W.D.N.Y., 1988). ... The objectionable practices, still prevalent even after the adoption of the FDCPA, often are exacerbated because independent collectors generally are unconcerned with the consumer's opinion of them, or their own reputations in the eyes of the public, and they proceed accordingly. ... Because the goal of the FDCPA is to eliminate abusive collection practices it is applicable whether or not a valid debt exists. *Baker* **v.** *G. C. Services Corp.*, 677 F.2d 775 (9th Cir., 1982). ... *Standing is afforded an aggrieved consumer to proceed under the act as long as the collector was purporting to attempt to collect an alleged debt.* In a report from the subcommittee, its chairman said, 'every individual, whether or not he owes the debt, has the right to be treated in a reasonable and civil manner.' 123 Cong.Rec. 10241 (1977); *Baker*, 677 F.2d at 777." *Johnson, supra*, 778 P.2d at 98-99. (emphasis added.)

Another provision of the FDCPA that is particularly relevant to the instant case on appeal is that set forth at 15 U.S.C. § 1692g(b) which provides:

> "(b) Disputed debts. If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, *the debt collector SHALL cease collection of the debt, or any disputed portion thereof, UNTIL the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a COPY of such verification or judgment, or name and address of the original creditor, IS MAILED TO THE CONSUMER BY THE DEBT COLLECTOR.*" (Emphasis added.)

This provision of the FDCPA requires the verification, or validation, of the alleged debt in order to prevent collection activities from being directed against the wrong person or against a debtor who has paid. *Johnson, supra*, 778 P.2d at 100; *Swanson, supra*, 869 F.2d at 1225; *Staub, supra*, 626 F.2d at 277; *Riveria, supra*, 682 F.Supp. 174. In the instant

case, Plaintiff submitted to Defendant its initial communication (hereinafter "Initial Communication"), dated 8 May 1991, in connection with its assignment of the alleged debt, seeking a "Total Due" of $4,126.64.[25] By return letter, dated 15 May 1991, Defendant duly notified Plaintiff of three specific items: (1) that the debt was disputed; (2) that verification of the debt was requested; and (3) to cease communications except for providing the requested verification.[26] 15 U.S.C. § 1692c(c). Plaintiff, however, persisted in mailing to Defendant dunning notices of varying amounts[27] and engaging in telephone harassment of Defendant throughout 1991, notwithstanding its admitted acknowldegment of the contents of Defendant's 15 May 1991 letter to cease and desist,[28] each of which communications thereafter constituted a separate violation of the FDCPA. 15 U.S.C. § 1692c(c); ***Wright* v. *Credit Bureau of Georgia, Inc.***, 548 F.Supp. 591, 594 (N.D.Ga., 1982). That was harassment. 15 U.S.C. § 1692d(5); ***Bingham* v. *Collection Bureau, Inc.***, 505 F.Supp. 864, 873 (D.N.D., 1981). Nevertheless, on or about 27 July 1992, Plaintiff filed the action now on appeal here seeking $3,976.64. One month later, on or about 27 August 1992, Plaintiff's Assignor also mailed to Defendant a dunning notice seeking $5,162.77,[29] notwithstanding the amount sought in Plaintiff's complaint and further notwithstanding

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[25] See Defendant's Counterclaim, "Exhibit A."

[26] "Exhibit B." *Ibid.* See also Record Transcript, p. 11, lines 1-5, and paragraphs 24-25 of Defendant's counterclaim (p. 12).

[27] See Counterclaim Exhibits "C-1," "C-2," "D-1," "D-2," "D-3" and "E." See also, R.T., p. 94, lines 2-5: "Mr. Mulliner: And we admit we sent those documents. We deny that those documents in any way violate the Act and I take it that that's your ruling, that they don't violate the Act."

[28] See Plaintiff's Answers to Request For Admissions (2nd Set) and Production of Documents, dated 25 October 1994, request #68.

[29] See Counterclaim Exhibit "J." At trial, Plaintiff, noting the obvious incorrectness of this amount, stated: "There are some numbers that will have to be backed out." (R.T., p. 24, lines 9-17.)

its assignment of the alleged debt to Plaintiff some sixteen (16) months earlier.[30] On or about 23 November 1992, Defendant mailed to Plaintiff, this time by certified mail, a second cease and desist letter again notifying Plaintiff *inter alia* to cease all attempts to collect the alleged debt and to withdraw its filed action.[31] Although Plaintiff admitted on discovery that it acknowledged the plain language contained in Defendant's notice of 15 May 1991, Plaintiff nevertheless failed to comply with Defendant's request which was duly made within the statutory 30-day period. Plaintiff, however, denied such failure,[32] but offered no proof to the contrary, nor is there any evidentiary support in the record other than Plaintiff's naked denial in this material respect. In light of Plaintiff's acknowledgment of the subject matter of Defendant's 15 May 1991 letter, as published in the record, and the court having been so advised at trial,[33] it was clear error for the court thereafter to find that Defendant had failed to prove "by a preponderance of the evidence" that she had a cause of action under the FDCPA and, subsequently, the UCSPA. ***Sorenson* v. *Kennecott-Utah Copper Corp.***, 873 P.2d 1141, 1147 (Ut.Ct.App., 1994) (findings are clearly erroneous if they are against clear weight of evidence or if appellate court reaches definite and firm conviction that mistake has been made). Moreover, to the extent the record fails to reflect any evidence whatsoever that Plaintiff complied with Defendant's written request for verification of the alleged debt, under § 1692g(b) Plaintiff was statutorily barred from further attempts to pursue collection thereof upon and after its receipt of Defendant's 15

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[30] Counsel stated assignment occurred on 25 April 1991. (R.T., p. 22, lines 17-18.) Exhibit A, however, affixed the alleged amount due as of 8 May 1991 at $4,126.64.

[31] See Counterclaim Exhibits "H" and "I."

[32] See Plaintiff's Answers to Request For Admissions (2nd Set) and Production of Documents, *Ibid.*, #69.

[33] See R.T., p. 11, lines 1-5.

May 1991 letter until such time as it complied with the provisions of the statute owing to the use of the mandatory form of the word "shall." See *Johnson, supra,* 778 P.2d at 100, where the Wyoming Supreme court makes this point crystal clear:

> "It was CheckRite's duty, under the statute, to cease collection activities on the date it received the letter from Johnson's counsel until it sent Johnson, through his counsel, verification of the alleged debt. *Staub*. The congressional intent is plain and no other meaning can possibly be imposed for this portion of the statute. [ ] *The mandatory form of the word 'shall' is used in the statute.* ... Federal precedent suggests that 'in construing a statute we are obliged to give effect, * * *, to every word Congress used.' *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *Baker*, 677 F.2d at 778. Application of that concept to this statute manifests an implicit requirement that the verification furnished from the creditor be in writing because the statute also requires that a copy of the verification be mailed to the consumer. (Wyo. cites omitted.) With that implicit requirement, an oral validation of a debt is not sufficient to comply with the FDCPA." (Emphasis added.)

In the instant case, not even an oral validation of the alleged debt was provided to Defendant by Plaintiff, much less in writing as the statute commands. Only on 28 October 1994, or nearly 3-1/2 years after its acknowledgment of Defendant's 15 May 1991 request, and then only after being compelled through discovery, did Plaintiff provide to Defendant copies of documents purporting to be "verification" of the alleged debt -- the conflicting amounts notwithstanding. Where the record reflects that such documents were included in the original assignment to Plaintiff on or about 25 April 1991, Plaintiff's failure to comply with Defendant's request was done knowingly and wilfully, and with intentional disregard of this mandatory duty.[34]

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[34] Exhibit A makes specific reference to this provision of the FDCPA where the second paragraph states:

> "Public Law 95-109, Section 809 [15 U.S.C. §1692g] requires you to be notified that unless the validity of this debt, or any portion thereof referred to by this letter is disputed within thirty days of receipt of this notice, this debt is assumed to be valid. If you notify the AUDIT & ACCOUNTING AUTHORITY in writing within thirty days that this debt, or any portion thereof, is disputed we will provide you with verification of the debt or judgment."

More importantly, however, where Plaintiff's failure to comply with the plain mandate of the statute absolutely prohibited its further collection attempts until compliance was met, it necessarily follows that such prohibition, likewise, precluded Plaintiff's standing to sue in this case, as Plaintiff's action cannot be reasonably construed as anything other than an illegal attempt to enforce prohibited collection in light of the admitted facts. Standing, being jurisdictional in nature, must be proven when challenged and may be raised at any time, including for the first time on appeal. The facts and admissions in this case clearly establish the want of jurisdiction on the grounds just shown and the same is, therefore, fatal to Plaintiff's case. Accordingly, the judgment is required to be vacated as void, as a matter of law.

Notwithstanding this fatal jurisdictional defect and bar against Plaintiff's further collection attempts, Defendant's counterclaim exhibits conclusively prove that Plaintiff continued to engage in proscribed communications with Defendant thereafter by both mail and telephone, each of which incidents constituted a separate violation of the FDCPA. ***Wright***, *supra*, 548 F.Supp. 591, 594; ***Bingham***, *supra*, 505 F.Supp. 864, 871-874. In the published exhibits, and at trial, Plaintiff admitted mailing such documents, although it also denied that such mailings violated the Act. (See footnote #27, *ante.*, p. 38.) Plaintiff failed, however, to offer any proof in support of this bare, conclusory assertion, offering only as follows:

> "We deny that those documents in any way violate the Act and I take it that that's your ruling, that they don't violate the Act." Ibid.

Being persuaded by this naked assertion notwithstanding Defendant's evidence to the contrary, the court, without more, ruled against Defendant nevertheless.

Plaintiff's Initial Communication also violated the FDCPA in a number of other significant ways. First, Defendant's counterclaim alleged that Exhibit A constituted a false

or misleading representation in that it contained the both the name "Audit & Accounting Authority, Ltd., and the name and logo of "ATTORNEYS Credit Service" as the most predominant visual effect on the form, thus misleading Defendant, as "the least sophisticated consumer," into believing that Plaintiff's communication involved attorneys in some respect.[35] Plaintiff also denied this allegation, albeit in circuitous fashion:

> "Mr. Mulliner: We've admitted mailing certain documents, that's correct, Your Honor. We deny that they say to use a name, which isn't registered with the state, by the way, licensed, bonded, Attorneys Credit Services misleads anybody into thinking that a letter is from an attorney when it doesn't purport to be signed by an attorney, doesn't have an attorney's letterhead or anything like that." (R. T., p. 88, lines 10-16.)

While Plaintiff's argument here does much to establish its cognizance that debt collection is a regulated industry; that Plaintiff is an entity organized and existing under the laws of this State; and that it is engaged in the business of collecting debts, under assignment, from creditors[36] -- all of which clearly subjects Plaintiff to the provisions of the Act -- nevertheless, its bare, unsupported denial fails to establish any proof how it's forms are not misleading to "the least sophisticated consumer" in light of the decisional law under the Act conclusively establishing such violations. Accordingly, to the extent this predominant wording appearing on the face of the form tended to mislead Defendant into believing that attorneys were somehow involved, this practice is soundly proscribed by the FDCPA. 15 U.S.C. § 1692e(3), (13). See ***Johnson***, 778 P.2d at 103:

> "As the statute has been applied, even though a debt collector uses its true name, that name still may violate the FDCPA if it has a likelihood of deceiving or misleading the consumer. ***Wright***, 548 F.Supp. 591. The use of a name, even though truly and appropriately belonging to the collector, that either states or implies that the collector is something that in fact it is not is

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[35] See Defendant's Counterclaim, para. 28, p. 13.

[36] See *State* **v.** *O'Neill Investigations, Inc.*, 609 P.2d at 524-25; *Wright* **v.** *Collection Bureau of Georgia, Inc.* 548 F.Supp. at 900; *Riveria*, 682 F.Supp. at 176; *Johnson*, 778 P.2d at 103. *Ibid.*

> a clear violation of the spirit of the statute even though arguably within the letter of the law. If the name would cause the 'least sophisticated consumer' to erroneously believe that the entity was a governmental agency or a law office, the use of the name could violate this provision even though it was the correct name for the debt collector."

Also see ***Bingham***, 505 F.Supp. at 870; ***Wright v. Collection Bureau of Georgia, Inc.***, 548 F.Supp. at 600 [9]. In ***Wright***, the court stated:

> "Since the appropriate standard is an objective one, the tendency of the defendants' statements to deceive is not determined by the fact that Ms. Wright may have been deceived into thinking that she was dealing directly with a consumer reporting agency. Rather, the court must determine for itself whether an unsophisticated consumer on the 'low side of reasonable capacity' would have been deceived. Applying that standard, the court holds that the letters sent by CBI to Ms. Wright violated section 1692e)."

Concurring with the rationale expressed in ***Wright*** and other federal cases, the opinion rendered in ***Johnson***, *supra*, sheds further light and instruction on this point:

> "Perhaps Johnson was perceptive enough not to be deceived by this notice, but CheckRite's argument demonstrates a type of abuse sought to be eliminated by the FDCPA. Furthermore, its contention ignores the rule that this act is to be construed to the benefit of the 'least sophisticated debtor.' *Swanson*, 869 F.2d 1222; ***Jeter v. Credit Bureau, Inc.***, 760 F.2d 1168 (11th Cir., 1985); ***Kimber v. Federal Finance Corporation***, 668 F.Supp. 1480 (M.D.Ala., 1987). See ***Baker***, 677 F.Supp. 370; ***Wright*** [*supra*]. Checkrite's argument with respect to the impact upon Johnson is not material, and CheckRite has not chosen to address the impact of its notice upon the least sophisticated of debtors. To avoid this precise dilemma, Congress wisely chose to require debt collectors to regulate themselves by the maintenance of procedures adapted to avoid such errors as that demonstrated in this case." ***Johnson v. Statewide Collections, Inc.***, 778 P.2d at 102.

At trial, however, the court wholly misconstrued Defendant's attempt to show how Plaintiff's forms tended to be misleading and violative of the Act where, without more, it summarily dismissed the matter by concluding as follows:

> "The ones that I have dealt with sanctions and things involving people who represent themselves to be attorneys who want to be, that sort of thing. If the letter was signed by a Mr. John Jones, attorney at law, I mean that's not - -". (R.T., p. 88, lines 17-21.)

Secondly, Plaintiff's Initial Communication further violated the FDCPA where,

although it contained a provision notifying Defendant of the thirty-day period in which to request verification of the alleged debt, that notification is misleading where it also specifies not only one, but two (2) additional conflicting time provisions in which to pay the alleged debt: (i) "...[m]ust now be paid upon receipt of this notice," and (ii) "You must remit payment to this office within seven (7) days...". Courts deciding this particular issue have consistently found that such conflict in terms does not effectively communicate to "the least sophisticated consumer" the statutory right to thirty days in which to request verification of an alleged debt. *Ost v. Collection Bureau, Inc.*, 493 F.Supp. 701, 702 (D.N.D., 1980) ("The 'communication' to the consumer, therefore, is that he has five days in which to pay the alleged debt or face some further 'proceeding' by the debt collector. Since the Act specifically gives the consumer thirty days in which to dispute the validity of that debt, the language on the front of Collection Bureau, Inc.'s form is, at best, misleading"); *Riveria*, 682 F.Supp. at 177; *Genuso v. Commercial Bank & Trust Co.*, 566 F.2d 437, 443 (3rd Cir., 1977) (disclosure of terms shall not be stated, utilized, or placed so as to mislead or confuse consumers; placement of disclosures is to be considered along with their statement and use); *Graziano v. Harrison*, 950 F.2d 107, 111 (3rd Cir., 1991) (notice of right to respond within thirty days is not effectively communicated when presented in conjunction with contradictory demand for payment within ten days); see also, *Swanson*, *supra*, 869 F.2d at 1225 (9th Cir., 1988) (same). Plaintiff's Initial Communication was thus further violative of the Act.

In sum, the documentary evidence published in this case clearly shows that Plaintiff violated the provisions of the FDCPA in numerous ways. As the court was bound to take judicial notice of the statute, due process was thus violated in several respects, including, but not limited to: (i) relying upon Plaintiff's naked assertions in ruling that Plaintiff's actions "don't violate the Act;" (ii) by refusing to refer to Defendant's counterclaim and

exhibits during trial; (iii) by having Defendant's Counsel "...[j]ust give me a Reader's Digest [version]" of the acts alleged to be violative of the FDCPA, rather than being permitted to call witnesses to be directly examined on these issues; (iv) by declaring as "res judicata" a further violative communication sent by Plaintiff to Defendant only after trial had been set in this matter and holding the same not to be a part of Defendant's counterclaim, notwithstanding the court's prior acknowledgment of Defendant's letter of 15 May 1991 advising Plaintiff to cease communications; and (v) ultimately accepting Plaintiff's conclusory "findings of facts" in these respects as constituting a "preponderance of the evidence" that Defendant had failed to establish that she had a cause of action under the FDCPA and the UCSPA. Thus, Defendant was deprived of due process as the proximate result of the court's fundamental misconception of the nature and purpose of the FDCPA. Federal precedent is equally instructive in clarifying errors such as these. In dealing with "initial communication" violations such as the one at issue here, the Ninth Circuit Court of Appeals, in holding such notice as violative of the Act, critically reviewed the actions of a federal magistrate and the district court in these terms:

> "The magistrate, whose findings were adopted without revision or comment by the district court, termed Swanson's argument 'frivilous,' concluding that '[n]othing in the notice can reasonably be construed as threatening [Swanson] with adverse consequences.' This conclusion is patently at odds with the tenor and text of the notice itself. The reference to the undefined 'master file,' juxtaposed with the admonition that Swanson's credit rating was his 'most valuable asset,' cannot reasonably be interpreted as anything but a threat: if Swanson did not pay within 10 days, his name would be placed in Southern Oregon's 'master file' and as a result he would lose his 'most valuable asset.'
>
> "The magistrate's conclusion demonstrates a fundamental misconception of the nature of section 1692g. The statute is not satisfied merely by inclusion of the required debt validation notice; the notice Congress required must be conveyed effectively to the debtor. ... Furthermore, to be effective, the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency. *E.g.*, *Thomas v. National Business Assistants, Inc.*, No. N82-469 (D.Conn., Oct. 5, 1984) ('inconspicuous and grossly overshadowed' notice did 'not properly notify recipients of their validation of debt rights') (cites omitted)." *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d at 1225 (9th Cir., 1988).

The "fundamental misconception" syndrome was similarly demonstrated by the trial court in this case where it had also stated:

> "...[b]ut there's nothing in here that jumps up and down and says that your client was misled or made some payments or was browbeaten to do anything. She certainly wasn't browbeaten into anything,..." (R.T., p. 93, lines 17-20.)

Thus the court completely misconstrued its adjudicative duty so clearly pointed out in *Johnson, supra,* that "...[t]he court must determine for itself whether an unsophisticated consumer on the 'low side of reasonable capacity' would have been deceived," rather than simply finding, without more, that "nothing" in Defendant's counterclaim "jumps up and down and says that" Defendant was "misled ... or was browbeaten into anything." Indeed, Defendant's counterclaim does not say that. Rather, it clearly alleges, fully supported by documentary evidence, numerous violations of the Act committed by Plaintiff during the pendency of this action that courts, both federal and state, trial and appellate, have repeatedly and consistently held to be violations over the past eighteen years since the Act was passed. Even the envelopes Plaintiff used to communicate with Defendant by use of the mails were violative of the Act where they facially demonstrate "symbols" and language other than Plaintiff's address. 15 U.S.C. § 1692f(8). In deciding just such a case the South Carolina Court of Appeals, in reversing a summary judgment, cited this provision of the FDCPA and stated:

> "An unfair practice includes the use of 'any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails ..., except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." *Phillips v. Periodical Publishers' Service Bureau, Inc., supra,* 369 S.E.2d 154, 156 (S.C.App., 1988).

On this point during trial, the following brief discussion ensued wherein Plaintiff clearly acknowledged that it is in the collection business, as evidenced by the symbol and language on it's mailing envelopes clearly stating ATTORNEYS CREDIT SERVICE:

"Mr. Stanton: Alleging or giving the innuendo that they are collecting for attorneys or that they are attorneys.
Mr. Mulliner: Put it back. They do collect for attorneys and I don't think that represents that they are attorneys." (R.T., p. 88, lines 12-16.)

In this regard the court, again, demonstrated its fundamental misconception of the Act where it stated as follows:

"And looking at some egregious sort of behavior with respect to agencies and maybe I've become desensitized because maybe, you know, having on your letterhead if it says Attorneys' Service or something, maybe I'm not reading it correctly, Mr. Stanton, but I am reading that they're providing a service to interpret Attorney's Credit Service. I don't read that as being threatening toward Billie Murdock or saying that we have big shot lawyers who are going to sue you when they really don't." (R.T., pp. 91-91, lines 22-25 and 1-5, respectively.)

But, as was held in ***Johnson*** and ***Wright***, *supras*, the court is not charged with the duty to "read that as being threatening," rather, the court must determine for itself whether an unsophisticated consumer on the "low side of reasonable capacity," would have been deceived by the symbol and language on Plaintiff's envelopes as well as the contents thereof -- even if it is Plaintiff's correct name.

Moreover, under the FDCPA statutory damages are available merely on proof of a violation, as no proof of actual damages need be established. Such was stated by the Ninth Circuit in ***Baker*** as follows:

"Further, the Act's damage provisions are very similar to those under the Truth in Lending Act (TILA), 15 U.S.C § 1640(a). Under TILA, statutory damages are available merely on proof of a violation; no proof of actual damages is required. ***Mourning v. Family Publications Service, Inc.***, 411 U.S. 356, 376-77, 93 S.Ct. 1652, 1664-65, 36 L.Ed.2d 318 (1973); ***Dzadovsky v. Lyons Ford Sales, Inc.***, 593 F.2d 538 539, (3rd Cir., 1979); ***Gennuso v. Commercial Bank & Trust Co.***, 566 F.2d 437, 443 (3rd Cir., 1977)." *Cf.* ***Baker v. G. C. Services Corp.***, 677 F.2d 778, 780 [11] (9th Cir., 1982).

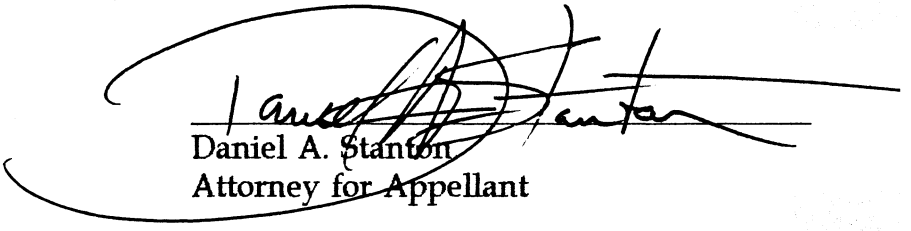
In sum, each and every contact Plaintiff made with Defendant after 15 May 1991 constituted a violation of the Act as the proximate result of its failure to abide by the provisions thereof where Defendant, as the "least sophisticated consumer" acting as a

"private attorney general," had exercised her statutory right to request that Plaintiff cease further communications except to provide her with verification of the alleged debt, which Plaintiff clearly did not do; nor could it in light of the aftermath of trial.

CONCLUSION

For the reasons expressed herein, the judgment rendered as against Defendant should be reversed with an award of costs and a reasonable attorney's fee.

Respectfully submitted this the 15th day of September, 1995.

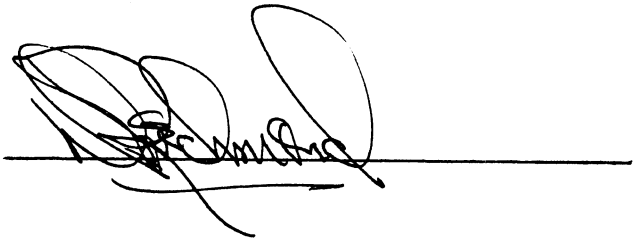


Daniel A. Stanton
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that this day I caused to be delivered to the Clerk of the Court of Appeals an original hereof together with seven (7) true and correct copies, and that I mailed this day two (2) copies hereof to Plaintiff's counsel, first-class postage prepaid and addressed as follows:

John G. Mulliner
363 N. University Ave., Suite 103
P. O. Box 1045
Provo, Utah 84603



THIRD JUDICIAL CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SANDY DEPARTMENT

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SALES AGREEMENT

Diversified Office Systems, Inc.
3783 South 500 West, Suite 5
Salt Lake City, Utah 84115
(801) 263-3032

PURCHASE ORDER	
SOLD BY	Jerry
DATE	9-31-82
TERMS	NET 10 DAYS

Sold To:

associated Dental Lab
1951 West 4700 South
Taylorsville 84118

Ship To:

QUANTITY	DESCRIPTION	UNIT	AMOUNT
	5460 Mailing Machine		1195.00
	S-120 Meter		395.00
	90 Day Warranty all parts & labor		
	To be Paid for as follows -		
	1/3 on Delivery		
	1/3 or 2/3 in 30		
	To be paid in full by 90 days.		
	Type Amount of payments $556.50 3 Payments		

SALES AGREEMENT—DIVERSIFIED OFFICE SYSTEMS INC., Seller, agrees to sell and the purchaser agrees to buy all of the goods and personal property described in the foregoing invoice at the price and upon the terms therein stated. The title to said property shall remain with the seller until the full purchase price is paid, but the purchaser shall be responsible for any loss, damage or injury to said property, whether by fire or otherwise, and no such loss, damage or injury shall relieve the purchaser from liability to pay the full purchase price. Time is of the essence of this contract and if default be made by the purchaser in any payment or any of the terms of sale, the seller may, at its election, declare the forfeiture hereunder and may take possession of the property and thereupon all of the purchaser's rights herein shall cease, and all payments theretofore made by the purchaser shall be forfeited as liquidated damages. No acceptance of any intermediate payment by the seller after default shall be a waiver of subsequent default or of the seller's right to repossess the property and declare a forfeiture. If because of any default of the purchaser the Company employs an attorney either to collect any balance due hereon or to repossess said property, the purchaser agrees to pay a reasonable attorney's fee and agrees to pay interest on past due accounts at the rate of 1½% per month, 18% per year. The purchaser shall not remove said property outside of the present premises where delivered without written permission of the seller.

SUB TOTAL	1590.00
SALES TAX	79.50
TOTAL	1669.50

PURCHASER _____
LEASE

1590.00
79.50
1669.50
556.50

DIVERSIFIED
OFFICE
SYSTEMS, INC

3783 SOUTH 500 WEST, SUITE 5
SALT LAKE CITY, UTAH 84115

DELIVERY RECEIPT

DELIVER TO:

Associated Dental Group

1951 West 4700 South

Salt Kake City, Utah 84118

QUANTITY	EQUIPMENT DESCRIPTION	SERIAL NUMBER
1	*5460 Mailing Machine*	*93219*
1	5-120	35081

RECEIVED BY Lorette Hopkins Date 4-12-82

LOG #	AMOUNT	REMARKS
83	$ 556.50	Postage Machine

CHECK AMOUNT: $ 556.50

~~OK~~

owes $ 1124.50 / 1113.00

ASSOCIATED DENTAL GROUP
TAYLORSVILLE, UTAH 84118

CHECK NO.	
1105	4/15/82

DATACORP

KAY BROWN

BRANCH MANAGER

5140 WEST AMELIA EARHART DR.
P. O. BOX 25187
SALT LAKE CITY, UTAH 84125
801/539-0158

Using R Line Waste
5205 for 5830

CONTRACT DENTISTRY
FAMILY DENTAL PLANS

Associated Dental Group

FAMILY DENTAL CENTER • 24 HOUR EMERGENCY CARE

1951 West 4700 South • Salt Lake City, Utah

969-1800

MEMBERSHIP CARD

NAME Craig Group

Waste 5318 FOR 5460

3-31-82